MINUTES
of
THE ADVISORY COMMITTEE
on
FEDERAL RULES OF CRIMINAL PROCEDURE

April 28-29, 2003
Santa Barbara, California

The Advisory Committee on the Federal Rules of Criminal Procedure met at Santa Barbara, California on April 28 and 29, 2003. These minutes reflect the discussion and actions taken at that meeting.

I. CALL TO ORDER & ANNOUNCEMENTS

Judge Carnes, Chair of the Committee, called the meeting to order at 8:30 a.m. on Monday, April 28 2003. The following persons were present for all or a part of the Committee's meeting:

Hon. Edward E. Carnes, Chair
Hon. John M. Roll
Hon. Susan C. Bucklew
Hon. David G. Trager
Hon. Harvey Bartle III
Hon. Tommy E. Miller
Hon. Reta M. Strubhar
Prof. Nancy J. King
Mr. Lucien B. Campbell
Mr. Jonathan Wroblewski, designate of the Asst. Attorney General for the Criminal Division, Department of Justice
Prof. David A. Schlueter, Reporter

Also present at the meeting were: Hon. A. Wallace Tashima, member of the Standing Committee and liaison to the Criminal Rules Committee; Mr. Peter McCabe and Mr. James Ishida of the Administrative Office of the United States Courts, and Mr. John Rabiej Chief of the Rules Committee Support Office of the Administrative Office of the United States Courts. Judge Friedman participated in portions of the meeting by telephone conference call.

Judge Carnes noted later in the meeting that Judge Miller's and Judge Roll's terms of appointment would expire in September 2003 and expressed deep appreciation for their hard work on a number of significant projects in their six years on the Committee. Judge Carnes pointed out that Judge Tashima's term on the Standing Committee would also end in September 2003, and thanked him for his contributions as a liaison member to the Criminal Rules Committee.

II. APPROVAL OF MINUTES

Judge Miller moved that the minutes of the Committee's meeting in Cape Elizabeth, Maine in September 2002 be approved. The motion was seconded by Judge Roll and following minor corrections to the Minutes, carried by a unanimous vote.

III. RULES PENDING BEFORE THE CONGRESS

Professor Schlueter informed the Committee that the package of Style amendments to Rules 1-60, the proposed substantive amendments to Rules 5, 10, 12.2, 12.4, 30, and 35 had become effective on December 1, 2002.

IV. RULES PUBLISHED FOR PUBLIC COMMENT:

A. Rule 41. Tracking-Device Warrants

Judge Miller informed the Committee that the comment period for the proposed amendments to Rule 41, regarding tracking-device warrants, and other amendments, had closed on February 15, 2003, and that the Committee had received written comments from seven persons or organizations. He added that those comments had been considered by the Rule 41 Subcommittee (Judge Miller, chair, Judge Bartle, Prof. King, Mr. Campbell, and Mr. Jaso), which in turn recommended only minor changes to the rule and note as published.

The Committee discussed a proposal from the National Assn' of Criminal Defense Lawyers (NADCL) that the rule contain a cross-reference to Rule 1(c), regarding the authority of federal judicial officers, other than magistrate judges, to issue search warrants. The Committee decided not to make the change to the rule. The Committee did agree with NADCL that the words "has authority" should be inserted in Rule 41(c)(3), and (4) to parallel similar language in Rule 41(c)(1) and (2). The Committee also considered, but rejected, a proposal from NADCL to completely redraft Rule 41(d) , regarding the finding of probable cause.

Mr. Wroblewski stated that the Department of Justice had raised the issue of whether the proposed rule should contain any reference to the point that some justification less than probable cause might support issuance of a warrant to install and use a tracking device. The Committee believed that doing so would be outside the scope of the amendment and that that issue should be left to the courts for resolution..

Judge Miller noted that Mr. Campbell had proposed several changes to Rule 41(e)(2)(B) concerning the time to be set for using a tracking device. His suggestion, that the word "reasonable" be inserted at several places in the rule, was adopted. The

Committee rejected a suggestion from NADCL that the rule place a limit of 90 days on monitoring activity.

Following additional discussion concerning the Committee Note, Judge Miller moved that the proposed amendments to Rule 41 be approved and forwarded to the Standing Committee for transmittal to the Judicial Conference. Judge Bartle seconded the motion, which passed with a unanimous vote.

B. Restyled Rules Governing § 2254 and § 2255 Proceedings and Official Forms Accompanying Rules

Judge Trager, chair of the Habeas Rules Subcommittee, provided a brief overview of the process of reviewing the public comments the Committee had received on the proposed amendments to the Rules Governing §§ 2254 and 2255 Proceedings and the official forms that accompany those rules.

1. Rules Governing § 2254 Proceedings.

Rule 1. Scope of Rules

It was noted that one of the commentators had suggested that Rule 1(b) be modified to reflect that for a habeas corpus petition not covered by § 2254, the court may apply any or all of the rules. Following a brief discussion, Rule 1(b) was modified to reflect that point.

Rule 2. The Petition

Judge Trager noted that the Subcommittee recommended that Rule 2(c)(2) should read "state the facts" rather than "briefly summarize the facts." As one commentator noted, the current language may actually mislead the petitioner and is also redundant.

Also, he noted Rule (2)(c)(5) should be changed to emphasize that any person, other than the petitioner, who signs the petition must be authorized to do so; the revised rule now specifically cites § 2242. The Reporter added that the Committee Note has been amended to reflect that point.

Several members raised the question whether the proposed language in Rule 2(c)(4) would include petitions typed or printed on a computer. Following a brief discussion the Committee decided to insert the word "printed" in the rule..

Rule 3. Filing the Petition; Inmate Filing

Judge Trager pointed out that The Committee Note has been changed to reflect that the clerk must file a petition, even in those instances where the necessary filing fee or

in forma pauperis form is not attached. The Note also includes new language concerning the equitable tolling of the statute of limitations.

Rule 4. Preliminary Review; Serving the Petition and Order

Judge Trager explained that the Subcommittee recommended that the rule be modified to reflect the view of some commentators that it is common practice in some districts for the government to file a pre-answer motion to dismiss. The Committee agreed with that recommendation and changed the word "pleading" in the rule to "response." It also made several minor changes to the Committee Note.

Rule 5. The Answer and the Reply

He pointed out that the Subcommittee recommended that Rule 5(a) be modified to read that the government is not required to "respond" to the petition unless the court so orders; the term "respond" has been suggested because it leaves open the possibility that the government's first response (as it is in some districts) is in the form of a pre-answer motion to dismiss the petition. The Note has been changed to reflect the fact that although the rule itself does not reflect that particular motion, it is used in some districts and refers the reader to Rule 4.

Judge Trager also informed the Committee that the proposed rule was potentially confusing to the extent that it required that the answer address affirmative defenses. That term, he noted, was a misnomer. Following additional discussion, the Committee agreed to delete the term from Rule 5(b) and changed the Note; it now reflects that there has been a potential substantive change from the current rule, to the extent that the published rule now requires that the answer address procedural bars and any statute of limitations. The Note states that the Committee believes the new language reflects current law.

The Committee discussed proposed Rule 5(e) that would provide the petitioner with the right to file a response to the respondent's answer. Judge Miller moved, and Judge Trager seconded, a motion that the rule remain as published, that is, petitioners would have the right to reply in all cases. The motion carried by a vote of 5 to 3.

The Note also addresses the use of the term "traverse." One commentator noted that that is the term that is commonly used but that it does not appear in the rule itself.

Rule 6. Discovery

Judge Trager pointed out that the Subcommittee had recommended new language for Rule 6(b), to require that discovery requests be supported by reasons, to assist the court in deciding what, if any, discovery should take place. The Committee agreed with the change and amended the Note to reflect the view that it believed that the change made explicit what has been implicit in current practice.

Rule 7. Expanding the Record

Judge Trager noted that the Subcommittee had recommended a minor change to Rule 7(a) by removing the reference to the "merits" of the petition. One commentator, he observed, had commented that the court might wish to expand the record for purposes other than the merits of the case. The Committee agreed to the change and also changed the rule to reflect that someone other than a party may authenticate the materials.

Rule 8. Evidentiary Hearing

Following a brief discussion, the Committee decided to change the Committee Note to reflect the view that the amendments to Rule 8 were not intended to supercede the restrictions on evidentiary hearings contained in § 2254(e)(2).

Rule 9. Second or Successive Petitions

Judge Trager pointed out the Subcommittee had recommended that new language be added to Rule 9 that would require the court to transfer a second or successive petition to the court of appeals. That practice, he observed, is currently used in several circuits, as reflected in the Note. Judge Carnes stated that there would certainly be cases that would not need to be transferred and the proposed rule would potentially impose an unnecessary burden on the courts of appeal. Judge Trager pointed out that for pro se petitioners, the proposed rule would expedite the process and insure that they had their day in court. Ultimately, the Committee voted to delete the new language.

Rule 10. Powers of a Magistrate Judge

Following a brief discussion, the Committee restyled the proposed rule

Rule 11. Applicability of Federal Rules of Civil Procedure

Judge Trager stated that the Subcommittee had no proposed changes to Rule 11.

2. Rules Governing § 2255 Proceedings.

Rule 1. Scope

Judge Trager stated that the Subcommittee had no proposed changes to Rule 1.

Rule 2. The Motion

Judge Trager stated that the Subcommittee recommended that Rule 2(b)(2) should read "state the facts" rather than "briefly summarize the facts." He pointed out that one

commentator had written that the current language may actually mislead the petitioner and is also redundant.

Several members raised the question whether the proposed language in Rule 2(b)(4) would include petitions typed or printed on a computer. Following a brief discussion the Committee decided to insert the word "printed" in the rule..

Judge Trager also noted Rule (2)(b)(5) should be changed to emphasize that any person, other than the petitioner, who signs the petition must be authorized to do so. Following discussion on whether or not § 2242 covered § 2255 proceedings, the Committee decided not to specifically cross-reference that statute.

Rule 3. Filing the Motion; Inmate Filing

Judge Trager stated that the Subcommittee had recommended a revision to the Committee Note to reflect that the clerk must file a motion, even in those instances where the necessary filing fee or in forma pauperis form is not attached. The Note also includes new language concerning the equitable tolling of the statute of limitations.

Rule 4. Preliminary Review

Judge Trager observed that the Habeas Subcommittee recommended that Rule 4 be changed to reflect the view of some commentators that it is common practice in some districts for the government to file a pre-answer motion to dismiss the § 2255 motion. The Committee agreed with that recommendation and changed the word "pleading" in the rule to "response." It also made several minor changes to the Committee Note.

Rule 5. The Answer and the Reply

Judge Trager pointed out that the Subcommittee recommended that Rule 5(a) be modified to read that the government is not required to "respond" to the motion unless the court so orders; the term "respond" has been suggested because it leaves open the possibility that the government's first response (as it is in some districts) is in the form of a pre-answer motion to dismiss the motion. The Note has been changed, he stated, to reflect the fact that although the rule itself does not reflect that particular motion, it is used in some districts and refers the reader to Rule 4.

The Committee had previously discussed the proposed amendment to proposed Rule 5(e), of the § 2254 rules that would provide the petitioner with the right to file a response to the respondent's answer. That proposal had been approved by a vote of 5 to 3, *supra*. The Committee agreed that the approach should be applied to Rule 5(d) of the § 2255 rules.

Finally, he stated that the Subcommittee recommended a change to the Note to addresses the use of the term "traverse," a point raised by one of the commentators on the proposed rule.

Rule 6. Discovery

Judge Trager stated that the Subcommittee had recommended new language for Rule 6(b), to require that discovery requests be supported by reasons, to assist the court in deciding what, if any, discovery should take place. The Committee agreed with the change and amended the Note to reflect the view that it believed that the change made explicit what has been implicit in current practice.

Rule 7. Expanding the Record

Judge Trager stated that the Habeas Rules Subcommittee had recommended a minor change to Rule 7(a) by removing the reference to the "merits" of the petition. He pointed out that one commentator had stated that the court may wish to expand the record for purposes other than the merits of the case. The Committee agreed to the change and also changed the rule to reflect that someone other than a party may authenticate the materials.

Rule 8. Evidentiary Hearing

The Committee made no changes to Rule 8, as published for public comment.

Rule 9. Second or Successive Petitions

Judge Trager pointed out that the subcommittee has recommended that new language be added to Rule 9 that would require the court to transfer a second or successive motion to the court of appeals. That practice is currently used in several circuits, as reflected in the Note. Applying its decision, supra, regarding Rule 9 of the § 2254 Rules, the Committee decided not to include the recommended language.

Rule 10. Powers of a Magistrate Judge

Following a brief discussion, the Committee restyled the proposed rule

Rule 11. Time to Appeal

Following a brief discussion on whether the rule should include any reference to a certificate of appeal, the Committee made no changes to Rule 11.

Rule 12. Applicability of Federal Rules of Civil Procedure and the Federal Rules of Criminal Procedure

The Committee made no changes to Rule 12.

3. Official Forms Accompanying the § 2254 and § 2255 Rules

Judge Trager initiated discussion regarding the official forms for the § 2254 proceedings and § 2255 proceedings, by observing that a number of commentators had addressed the wisdom of including possible grounds for relief in the official forms. Several members pointed out that listing possible grounds for relief might lead to petitioners and movants raising a number of nonmeritorius arguments; other members responded that the list would provide useful guides for petitioners and movants in framing the issues for the court's consideration. Following additional discussion, Judge Bartle moved that the list of possible grounds for relief be deleted from the forms accompanying the § 2254 Rules. Judge Miller seconded the motion, which carried by a vote of 6 to 4. Following additional brief discussion, Judge Bartle moved, and Judge Miller seconded, a motion to delete the list of possible grounds of relief from the § 2255 forms. That motion also passed by a vote of 6 to 4.

Judge Trager moved that the Committee approve the §§ 2254 and 2255 Rules and the accompanying forms, and forward them to the Standing Committee for transmittal to the Judicial Conference. Judge Miller seconded the motion, which carried by a unanimous vote..

C. Rule 35. Definition of Sentencing

Professor Schlueter pointed out that at the Committee's Spring 2002 meeting that the Committee had approved a change to Rule 35 that would have substituted the term "oral announcement of the sentence" in place of the term "sentencing," throughout the rule. He continued by noting that that task had proved cumbersome and that at the September 2002 meeting, the Committee had agreed to insert a new Rule 35(a) that would include a definition of sentencing for purposes of Rule 35. He also pointed out that he had drafted a proposed Note to accompany that new provision.

Following brief discussion, the Committee agreed to designate the new definitional provision as Rule 35(c) in order to maintain the current numbering within the rule, in particular Rule 35(b), which is readily identifiable to courts and counsel. The Committee ultimately approved the rule and voted to forward the amendment to the Standing Committee with a recommendation to transmit it to the Judicial Conference.

V. PENDING PROPOSED AMENDMENTS TO RULES

A. Rule 11(b)(1)(A). Use of Defendant's Statements; Proposal to Clarify Restyled Language.

Judge Carnes informed the Committee that Judge Brock Hornby had written to the Committee, suggesting that restyled Rule 11 now contained an ambiguity. In his view, as rewritten, Rule 11(b)(1)(A) seems to require that the judge need only advise a defendant of the consequences of making a false statement under oath, if the defendant is entering a guilty plea to a charge involving perjury or false statement. The Committee discussed the issue and concluded that no corrective action was required.

B. Rule 11. Proposal to Require Judge to Address Defendant re Collateral Consequences of Plea.

Judge Friedman, participating by telephone, recommended that the Committee consider an amendment to Rule 11 that would require the court to inform an alien who is pleading guilty of the possible collateral consequences that might result, i.e., deportation. Judge Friedman pointed out the suggestion had originated in a memo prepared by Mr. Roger Pauley, after he had left the Committee. The Reporter pointed out that the Committee had considered, and rejected a similar proposal in 1992. Judge Trager responded that since 1992, there had been a change in the law, to the effect that currently, a finding of guilt for an aggravated felony results in mandatory deportation. Judge Tashima added that offenses other than an aggravated felony may serve as grounds for deportation, but that requiring the advice could prove to be a slippery slope. Professor King noted that she was aware of cases where defendants had alleged ineffective assistance of counsel where the defendant had not been informed by counsel of the possibility of deportation if he or she entered a plea of guilty to an aggravated felony.

Mr. Campbell expressed the view that the general advice regarding possible consequences would be sufficient and Judge Roll observed that the area of immigration statutes and regulations was a highly technical area and that it would be dangerous to require judges to give any specific warning about possible deportation.

Mr. Wroblewski pointed out the possible legal implications of amending Rule 11 to require the warning and noted that the ABA is studying the issue of collateral consequences.. Judge Miller added that if the proposal were adopted, that there might be other areas where a warning about collateral consequences would be required, e.g., tax consequences, civil liability, etc. Judge Trager believed that no amendment was required; judges could give the advice, without being required to do so.

Following additional comments, Judge Trager moved to table the proposal. The motion was seconded and failed by a vote of 5-6. Judge Roll then moved that Rule 11 not be amended to include a warning requirement concerning collateral consequences vis a vis, immigration issues. Judge Miller seconded the motion, which carried by a vote of 6-3-1.

C. Rule 12.2. Notice of Insanity Defense; Mental Examination and Sanctions for Failure to Disclose.

The Reporter noted that Mr. Pauley had written to the Committee in July 2001 suggesting that the revised Rule 12.2, currently pending before the Supreme Court, was missing a sanction provision for those cases where the defense fails to disclose the results of a mental examination conducted by the defense expert. The issue had been discussed briefly at the April 2002 meeting and again at the September 2002 meeting. At that meeting Judge Carnes had appointed a subcommittee, consisting of Mr. Campbell and Mr. Jaso to consider language for the amendment.

Using language submitted by that Subcommittee, the Reporter presented the proposed language and suggested Committee Note.

Several members suggested rewriting the last paragraph of the Committee Note to recognize that the court's sanction should be proportional to counsel's failure to disclose. Following additional discussion, Mr. Campbell moved that the Committee approve the proposed amendment and submit it to the Standing Committee with a recommendation to publish the rule for public comment. Judge Roll seconded the motion, which carried with a unanimous vote.

D. Rules 29, 33, 34, and 45; Proposed Amendments re Rulings by Court and Setting Times for Filing Motions.

Judge Carnes reviewed briefly the Committee's consideration of amendments to Rules 29, 33, 34, and 45, proposed by Judge Friedman, who participated by telephone. He noted that under the rules, the court was required to rule on any motion for an extension of time, within the seven-day period specified for filing the underlying motion. Failure to do so, deprived the court of the jurisdiction to consider an underlying motion, filed after the seven-day period. Those proposals, said Judge Carnes, had been under consideration for several years and that the Reporter had drafted language to make the necessary changes. Judge Friedman urged the Committee to make the amendment and endorsed the language suggested by the Reporter.

Following additional brief discussion, Judge Miller moved that the Committee approve the proposed language and forward the amendments to the Standing Committee with a recommendation to publish them for public comment. Professor King seconded the motion, which carried by a vote of 8 to 2.

E. Rule 29; Proposed Amendment Regarding Appeal for Judgments of Acquittal.

Judge Carnes informed the Committee that the Department of Justice had submitted a lengthy memo regarding a proposed change to Rule 29, that would preserve the government's right to appeal an adverse ruling on a motion for a judgment of acquittal. Mr. Wroblewski explained that the current rule permits the judge to reserve ruling on a motion for a judgment of acquittal until after the jury has returned a verdict. Rulings made before a verdict cannot be appealed by the government, no matter how

erroneous. In his view, the Department's proposal would correct an anomaly in the Rules, that is, the ability of a court to grant an unappealable judgment of acquittal. He offered several examples of cases in which the court had granted a motion after jeopardy has attached, but before the jury returned a verdict, and where the reasons given by the court to support granting the motion were unsupportable. He noted that the proposal was controversial and believed that it was important to published a proposed amendment and obtain public comment.

Judge Carnes noted the gravity of the proposed amendment and recognized examples where the district court may have abused its discretion. But he questioned whether an amendment to Rule 29 was the only remedy available to correct those possible abuses. Judge Trager noted that he supported the proposal. Professor King observed that there were weighty policy considerations involved in any decision to expand the government's right to appeal.

Judge Miller recommended that the matter be deferred to a later meeting and that it would be helpful to obtain additional data on the scope of the problem. The Committee discussed the possibility of calling upon the Federal Judicial Center to study the issue.

Judge Roll added that it would be helpful to address related issues, for example, the issue of lesser-included offenses or multiple-count cases, and also to examine those cases where it is clear that there may be an obvious flaw and the court does not wish to put the jury through the motions of deliberating to a verdict.

Finally, several members observed that after the jury returns a guilty verdict in a high-profile case, the judge may face additional political pressure not to grant the motion.

F. Rule 32, Sentencing; Proposed Amendment re Allocution Rights of Victims of Non-violent and Non-sexual Abuse Felonies.

Judge Carnes pointed out that at its September 2002, meeting the Committee had agreed to amend Rule 32 to provide for allocution for victims of non-violent and non-sexual abuse felonies. The Reporter explained that based upon those discussions he had drafted proposed language for the amendment, including a provision that would provide that a court's decision regarding allocution would not be reviewable, based upon concerns raised at the September meeting.

Several members expressed concern over the advisability of including a nonreviewability provision in the rules. Others observed that there was some authority for the view that victims did not have standing to appeal a court's decision denying them the ability to address the court. Following additional discussion, Judge Miller moved and Judge Bartle seconded, a motion to delete the nonreviewability provision. That motion carried by a vote of 9-0-1.

The Reporter also explained that the draft amendment did not make any specific provision for hearing from representatives of victims of non-violent or non-sexual abuse felonies, on the view that the policy reasons for permitting statements by third persons did not seem as compelling, for what would usually be considered "economic" crimes. Judge Roll agreed and stated that he would be opposed to an amendment extending the allocution right to third persons. Judge Bartle observed that in any event, the court could decide to hear from third persons, speaking on behalf of a victim.

Judge Miller moved that the Committee approve the amendment and forward it to the Standing Committee with a recommendation that it be published for public comment. Judge Bartle seconded the motion, which carried by a vote of 7-2-1.

G. Rule 32.1. Revoking Or Modifying Probation Or Supervised Release. Proposed Amendments To Rule Concerning Defendant's Right Of Allocution.

The Reporter briefly reminded the Committee that in 2002, Judge Carnes had provided the Committee with a copy of *United States v. Frazier*, 283 F.3d 1242 (11th Cir. 2002), where the court observed that there is no explicit provision in Rule 32.1 for the defendant's right to allocution; he pointed out that the court had recommended that the Advisory Committee might wish to address that issue. At the April 2002 meeting, the Committee had voted to amend Rule 32.1 and that in response to that vote, the Reporter had drafted proposed language, that would add a new Paragraph (E) in Subdivision (b)(2). He added that although the Committee had addressed only the question of allocution rights at revocation hearings, a similar provision might be appropriate at proceedings to modify a sentence. The Committee had agreed with that view and asked the Reporter to consider the issue and prepare an additional draft amendment. He noted that he had done so.

Following a brief discussion of the draft, Judge Miller moved that the Committee approve the proposed amendment to Rule 32.1 and forward it to the Standing Committee with a recommendation that it be published for public comment. Judge Roll seconded the motion, which carried by a unanimous vote.

H. Rule 32.1. Revoking Or Modifying Probation Or Supervised Release; Proposed Amendment To Remove Requirement For Production Of Certified Copies Of Judgment..

Judge Carnes noted that Magistrate Judge Sanderson had recommended that Rule 32.1 be amended to remove the requirement that the government provide certified copies of the judgment. Judge Miller observed that Rule 5 did not contain that requirement and that the language in Rule 32.1 was probably a carry-over from the attempt to move parts of former Rule 40 to Rules 5 and 32.1. He noted that some deficiencies in Rule 40 continue to surface and recommended deferring the recommendation to see if other

problems with the restyled rules surface. He offered to poll other magistrate judges to see if this is a problem, and if there are other problems that should be addressed.

I. Rule 59; Proposed New Rule Concerning Rulings by Magistrate

Judge Miller provided a brief history of the proposed new rule that would address the issue of review of magistrate judge decisions: Judge Tashima had originally proposed that the Committee consider adding a new rule to the Rules of Criminal Procedure that would parallel Rule of Civil Procedure 72(a). The issue had been raised in *United States v. Abonce-Barerra*, 257 F.3d 959, 969 (9th Cir. 2001). At its April 2002 meeting, the Committee had voted consider the issue further and at its September 2002 meeting, he and Judge Roll had presented language for the Committee's consideration, which would have been in the form of an amendment to Rule 12. Following discussion at that meeting the subcommittee had amended the proposal to include reference to magistrate judges taking guilty pleas. After that September meeting, he had consulted the Magistrate Judges Committee to solicit their views on the proposed amendment.

After further consideration, the subcommittee now recommended that any proposed rule not include reference to guilty pleas. First, he noted, the Magistrate Judges' Committee was opposed to any reference in the rule to taking guilty pleas. And second, the Ninth Circuit had granted *en banc* review in *United States v. Reyna-Tapia*, 294 F.3d 1192 (9th Cir.), *vacated by* 315 F.3d 1107 (9th Cir. 2002), the case that had provided the impetus for including reference to guilty pleas in the proposed rule.

Judge Miller also explained that the subcommittee had redrafted the rule as a new Rule 59.

In considering the proposed language, several members noted that there was no provision for appealing a magistrate judge's oral orders. Additional language addressing that point was discussed and added to the draft.

Following a brief discussion concerning the differences between "nondispositive" and "dispositive" matters, Judge Trager moved that the Committee approve the new Rule 59 and forward it to the Standing Committee with a recommendation that it be published for public comment. Judge Roll seconded the motion, which carried by a vote of 8 to 1.

VI. OTHER RULES AND PROJECTS PENDING BEFORE ADVISORY COMMITTEES, STANDING COMMITTEE AND JUDICIAL CONFERENCE

A. Status Report on Legislation Affecting the Federal Rules of Criminal Procedure

1. Rule 6. Grand Jury

Mr. Rabiej reported that as the restyled Criminal Rules were going into effect in December 2002, Congress had further amended Rule 6, based upon the former version of the rule. The amendment permits the government to share grand jury information with foreign governments in terrorism cases. He noted that he, the Reporter, Judge Carnes, and the Department of Justice had prepared conforming language to remedy the conflict in the language, but to date Congress had not made the change. Thus, there is a potential conflict between the rule that went into effect on December 1, 2002, and the subsequent legislative amendment.

2. Congressional Consideration of an Amendment to Rule 46.

Mr. Rabiej briefly reported that Congress had considered an amendment to Rule 46, urged by bail bondsmen that would potentially limit the ability of judges to forfeit bail for violation of conditions of release, other than for failure to appear in court. Mr. Rabiej added that the bail bondsmen were concerned that if left intact, Rule 46 might serve as the basis for similar treatment in state practice. Judge Carnes indicated that he had testified on the matter and presented additional statistical data supporting the current version of the rule.

VII. DESIGNATION OF TIME AND PLACE OF NEXT MEETING

The Committee tentatively agreed to hold its next meeting in October 2003, in Oregon, depending on availability of accommodations.

Respectfully submitted

David A. Schlueter
Professor of Law
Reporter, Criminal Rules Committee